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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 19

CHARLES PAUL, Director of Agriculture of the State of California and STANLEY MOSK, Attorney General, State of California,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal From the United States District Court for the Northern District of California, Southern Division

REPLY BRIEF FOR APPELLANTS

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PRINTED IN CALIFORNIA STATE PRINTING OFFICE

INDEX

Page

ARGUMENT

I. The concessions made, and the loud silences, in the brief for the United States show that the judgment of the district court must be reversed 1

II. Contractors delivering milk to commissary grocery stores, and for troop ration are not immunized from compliance with local milk stabilization statutes 3

III. The California milk stabilization act does not impose a prohibition on the national government or its officers 9

IV. Article I, Section 8, Clause 17, of the Constitution is not per se exclusory of local law 17

V. The subsequent (1897) California cession statute qualified the earlier (1872) consent statute, and by failing to record land descriptions as required by the 1897 statute, the United States did not acquire jurisdiction at Castle, Travis or the Oakland bases 24

CONCLUSION 30

APPENDIX

I. 1968 amendments to the Armed Services Procurement Act, 76 Stat. 528 31

II. Regulation 405-20, August 14, 1961, Department of the Army 35

III. Opinion of the Judge Advocate General, JAGR 1954/2153, Department of the Army 42

IV. Opinion of the Judge Advocate General S.P.J.G.R. 1945/9595, Department of the Army 45

CITATIONS

CASES

Page

Alabama v. King & Boozer, 314 U.S. 1 (1941) 11, 13, 14, 16, 17
Aldridge v. Williams, 3 How. 9 (1824) 18
Arapajolu v. McMenamin, 113 C.A. 2d 824, 249 P. 2d 318 (1952) 20
Arizona v. California, 283 U.S. 423 (1931) 12, 14
Arledge v. Mabry, 52 N.M. 303, 197 P. 2d 884 (1948) 20
Baltimore & A.R. Co. v. Lichtenberg, 176 Md. 383, 4 A. 2d 734, appeal dismissed, 308 U.S. 94 (1939) 12, 16
Borak v. Biddy, 141 F. 2d 278 (D.C. Cir.), cert. denied, 323 U.S. 738 (1944) 6
California Comm'n. v. United States, 355 U.S. 534 (1958) 26
City of Detroit v. Murray, 355 U.S. 489 (1958) 13
Consolidated Milk Producers v. Parker, 19 C. 2d 815, 123 P. 2d 440 (1942) 24
Curry v. United States, 314 U.S. 14 (1941) 13
Davies Warehouse Co. v. Bowles, 321 U.S. 144 (1944) 35
Esso Standard Oil Co. v. Evans, 345 U.S. 495 (1953) 13, 16
Fort Leavenworth R.R. Co. v. Lowe, 114 U.S. 525 (1885) 18, 22, 23
Gillespie v. Oklahoma, 257 U.S. 501 (1922) 16
Graves v. Texas Co., 298 U.S. 393 (1936) 16
Hatch v. United States, 212 F. 2d 280, 9 Cir. 1950 6
James v. Dravo Contracting Co., 302 U.S. 134 (1937) 11, 12, 46, 23, 28
Johnson v. Maryland, 254 U.S. 51 (1920) 12, 14
Kern-Limerick, Inc. v. Scurlock, 347 U.S. 110 (1954) 12, 14
Kohl v. United States, 1 Otto 367 (1876) 25, 28
Livingston v. United States, 364 U.S. 281 (1960) 12
Lowe v. Lowe, 150 Md. 502, 133 Atl. 729 (1926) 19, 20
Maxwell v. Dow, 176 U.S. 581 (1900) 18
Mayo v. United States, 319 U.S. 441 (1942) 12, 14, 16
McMahon v. Polk, 10 S.D. 296, 73 N.W. 77 (1897) 20
Morris v. United States, 174 U.S. 196, (1899) 22
Oklahoma Tax Comm'n. v. Texas Co., 336 U.S. 342 (1949) 16
Opinion of the Justices, 42 Mete. 580 (Mass. 1841) 20
Pacific Coast Dairy v. Dept., 19 Cal. 2d 818, 123 P. 2d 442, rev'd. on another ground, 318 U.S. 285 (1943) 13, 23, 24
Panama Refining Co. v. Ryan, 293 U.S. 388 (1933) 4
Panhandle Oil Co. v. Knox, 277 U.S. 218 (1928) 16
Penn Dairies v. Milk Control Comm'n., 318 U.S. 261 (1943) 3, 4, 5, 6, 7, 12, 13, 14, 15, 16, 35
Railway Mail Assn. v. Corsi, 326 U.S. 88 (1945) 16
Schwartz v. O'Hara Township School Dist., 375 Pa. 440, 100 A. 2d 621 (1953) 20

CITATIONS—Continued

CASES—Continued

	Page
Seal of Gold Mining Co. v. Slater, 161 Cal. 621, 120 Pac. 15 (1911)	28
Smith v. Davis, 323 U.S. 111 (1944)	13, 16
Standard Oil Co. v. California, 291 U.S. 242 (1934)	23, 24
State v. Corcoran, 155 Kan. 714, 128 P. 2d 999 (1942)	20
State v. Tully, 31 Mont. 365, 78 Pac. 760 (1904)	26
State v. Willett, 117 Tenn. 334, 97 S.W. 299 (1906)	20
Stewart & Co. v. Sadrakula, 309 U.S. 94 (1940)	12, 16
Surplus Trading Co. v. Cook, 281 U.S. 647 (1930)	22, 23
Trinity Farm Co. v. Grosjean, 291 U.S. 466 (1934)	12
United States v. Baltimore & A. R. Co., 308 U.S. 525 (1939)	12
United States v. City of Detroit, 355 U.S. 466 (1957)	16
United States v. Grimaud, 220 U.S. 506 (1911)	4
United States v. Rickert, 188 U.S. 432 (1903)	12
United States v. Tully, 140 Fed. 899 (C.C.D. Mont. 1905)	26
United States v. Union Pacific R.R. Co., 91 U.S. 72 (1875)	18
Utah Power & Light Co. v. United States, 243 U.S. 389 (1917)	19
Valley County v. Thomas, 109 Mont. 345, 97 P. 2d 345 (1939)	26
Van Brocklin v. State of Tennessee, 117 U.S. 151 (1886)	12

CONSTITUTION, AND FEDERAL STATUTES AND REGULATIONS

Constitution of the United States:

Art. I, Sec. 8, cl. 17 (Power to exercise exclusive legislation) 2, 17, 19, 22, 24, 27, 28

Art. IV, Sec. 3, cl. 2 (Control of federal property) 19

STATUTES:

Act of July 16, 1790, 1 Stat. 130	21
Act of February 27, 1801, 2 Stat. 103	22
Act of August 6, 1861, 12 Stat. 320	22
Act of February 21, 1871, 16 Stat. 419	22
Act of April 10, 1878, 20 Stat. 36	4
Act of March 3, 1883, 22 Stat. 487	4
Act of March 2, 1901, 31 Stat. 905	7
Act of February 23, 1927, 44 Stat. 1176	21
Act of October 9, 1940, 54 Stat. 1083	26
Act of August 10, 1956, 70A Stat. 120	5
Act of July 7, 1958, 72 Stat. 347	2, 21
Act of August 12, 1958, 72 Stat. 547	5
Act of March 18, 1959, 73 Stat. 11	3, 21
Act of September 10, 1962, 76 Stat. 528	6, 35

CITATIONS—Continued

CONSTITUTION, AND FEDERAL STATUTES AND REGULATIONS—Continued

	Page
Department of Defense Appropriation Act, 1963, 76 Stat. 318	7, 11, 17
Federal Register Act, Sec. 7, 49 Stat. 500	6
Treaty of Guadalupe Hidalgo, 9 Stat. 922	25
1875 Revised Statutes:	
Sec. 161	
355	4, 5
5 U.S.C. 22	26
10 U.S.C. 2202	5
2304(a)	5
2304(a)(10)	31
2304(a)(14)	7
2304(g)	31
2306(f)	31
2310(b)	32, 35
2311	34
	34
REGULATIONS:	
Armed Services Procurement Regulation, para. 1-301, pp. 64, 65, 72	6
Regulation 405-20, August 14, 1961, Department of the Army	
32 C.F.R. 1.300-1	20, 36
1.301	6
7.104-29	6
p. 9	35
25 F.R. 14077	5
14082	5
	6
CALIFORNIA STATUTES	
Government Code, sec. 114	29
Stats. 1897, ch. 56, p. 51	24, 26, 27, 28, 29
Political Code, sec. 34	24, 25, 27, 28, 29
OTHER STATE STATUTES	
Arkansas Acts, 1903, p. 346	23
Kansas Laws, 1875, p. 95	22, 23
Maryland Laws of 1791, ch. 55	21
Nevada Stats. 1921, sec. 2, ch. 23	26
Rhode Island Constitution, 1843, Art. II, sec. 5	20
Tennessee Acts, 1895, sec. 1, ch. 110	26
Texas Laws, 1849, Art. 1639	26
Washington Stats., 1917, sec. 20	26

CITATIONS—Continued

MISCELLANEOUS

	Page
Brief for the United States, Adams v. United States, Supreme Court of the United States, O.T. 1942, No. 889	26
Brief for Appellees, Pacific Coast Dairy v. Dept., Supreme Court of the United States, O.T. 1942, No. 275	23
Brief for the United States, Paul v. United States, Supreme Court of the United States, O.T. 1962, No. 19	1, 2, 3, 7, 9, 10, 14, 15, 17, 21, 22, 23, 25, 27, 28
Brief for the United States, Penn Dairies, Inc. v. Milk Control Comm'n., Supreme Court of the United States, O.T. 1942, No. 399	15
California Opinions:	
Cal. Ops. Atty. Gen. N.S. 3188, January 16, 1941	29
23 Cal. Ops. Atty. Gen. 14, January 8, 1954	27, 28
Federalist, James Madison, 1788, No. 43	18
Hearings, House of Representatives, 1935, Taking the Profits Out of War, pp. 591-616	7
Jurisdiction Over Federal Areas Within the States, Gov't Printing Office, 1956, Part I, p. 70	20
Opinion of the Judge Advocate General, JAGR 1954 2153, April 9, 1954	29, 43
Opinion of the Judge Advocate General, SPJGR 1945 9595, October 23, 1945	29, 46
S. Report No. 1578, 87th Cong., 2nd Sess., pp. 9, 10	7
S. Report No. 1884, 87th Cong., 2nd Sess., pp. 2-3	35
The Federalist, Henry Cabot Lodge, 1888	18

IN THE

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No. 39

CHARLES PAUL, Director of Agriculture of the State of California and STANLEY MOSK, Attorney General, State of California,

Appellants,

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Appellee.

On Appeal From the United States District Court for the Northern District of California, Southern Division

REPLY BRIEF FOR APPELLANTS

The loud silences in the brief for the United States, as well as the weaknesses underlying the major premises advanced, require brief reply by state officers.

ARGUMENT

I. The Concessions Made, and the Loud Silences, in the Brief for the United States Show that the Judgment of the District Court Must Be Reversed.

Fairly read, the Brief for the United States makes the following concessions, and, by silence, leaves the following contentions of state officers unchallenged:

1. In a tacit concession of error by the district court, the government "has concluded as a matter of procurement policy not to assert immunity from these [California minimum dairy farmer milk] minimum prices but to accede to full compliance with those requirements." Brief for the United States, p. 12.

2. No claim is asserted by the United States that the California minimum dairy farmer and wholesale milk price regulations have other than even-handed application to distributors selling to the United States as contrasted to distributors selling to state and local agencies, charities, or to private retail grocery stores.

3. No claim is made by the United States that the enforcement of the California milk stabilization act against federal contractors will have any effect upon government procurement except for the resulting increase in the price of milk purchased within the State by the government. No claim is made that the state-established prices are too high or are otherwise unfair.

4. No argument is made rebutting the assertion by California that enforcement of the California milk stabilization act against contractors delivering milk to officers' clubs, post exchanges, and post restaurants, and other nonappropriated fund activities of the government, is consistent with the federal procurement function and with the federal procurement statute.

5. No answer is made to the recognition by Congress in the statutes admitting Alaska and Hawaii to statehood that the power of exclusive legislation under Article I, Section 8, clause 17,

is not per se exclusory of local law. Section 11(b), Act of July 7, 1958, 72 Stat. 347; Section 16(b), Act of March 18, 1959, 73 Stat. 11.

6. The government concedes that a state may qualify statutes tendering transfer of jurisdiction to the United States upon federal compliance with state procedures such as the necessity of filing land descriptions. Brief for the United States, pp. 31-32.

The tacit confession that the district court erred in striking down the state's dairy farmer milk price regulations, requires that the statute be declared constitutional, at least as to such regulations. The issues remaining for decision on appeal are whether the California wholesale milk price regulations may be constitutionally enforced against independent contractors with the United States under the facts of the case, and whether the district court committed prejudicial procedural error. In short, while the judgment must in any event be reversed, there remain substantial questions which require resolution by the Court on this appeal.

II. Contractors Delivering Milk to Commissary Grocery Stores, and for Troop Ration Are Not Immunized From Compliance With Local Milk Stabilization Statutes.

The thrust of the government's argument that the state's milk stabilization act is invalid as applied to federal contractors is that the federal regulations governing procurement, were formerly permissive (*Penn Dairies, Inc. v. Milk Control Comm'n*, 318 U.S. 261 (1943)), are now mandatory and in conflict with local law. Brief for the United States, pp. 58-73.

But the power to make regulations conferred by Congress upon executive officers is ". . . not for the government of their departments, but for administering the laws which did govern." *United States v. Grimaud*, 220 U.S. 506, 517 (1911). Such regulations are valid ". . . only as subordinate rules and when found to be within the framework of the policy which the Legislature has sufficiently defined." *Panama Refining Co. v. Ryan*, 293 U.S. 388, 429 (1933).

The statutes before the court in *Penn Dairies v. Milk Control Comm'n*, 318 U.S. 261, 276, authorizing implementing administrative regulations provided:

> "That the Secretary of War is hereby authorized to prescribe rules and regulations to be observed in the preparation and submission and opening of bids for contracts under the War Department: . . ." Act of April 10, 1878, 20 Stat. 36, as amended, Act of March 3, 1883, 22 Stat. 487.

1875 Revised Statutes, Section 161, provided:

> "The head of each Department is authorized to prescribe regulations, not inconsistent with law, for the government of his Department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it . . ."

The court in *Penn Dairies, supra*, 318 U.S. 261, 276, held that these statutes, citing 20 Stat. 36 and 22 Stat. 487, "give no hint of any delegation to the Secretary

[of War] or his subordinates of power to do what Congress has failed to do—restrict the application of local regulations, otherwise applicable to government contractors, which increase price."

The statutes cited in the Federal Register as authority for the Secretary of Defense for the issuance of the current procurement regulations are Revised Statutes, Section 161, as re-enacted by the Act of August 12, 1958, 72 Stat. 547, 5 U.S.C. 22; and 10 U.S.C. 2202, 70 A Stat. 120, 32 C.F.R. p. 9; 25 F.R. 14077. Revised Statutes, Section 161, reads today the same as quoted above. 10 U.S.C. 2202 provides:

> "Notwithstanding any other provision of law, an officer or agency of the Department of Defense may obligate funds for procuring, producing, warehousing, or distributing supplies, or for related functions of supply management, only under regulations prescribed by the Secretary of Defense."

It is clear, therefore, that today, as at the date of the *Penn Dairies* decision, that the statutes authorizing the issuance of procurement regulations give no hint of any delegation of power to the Secretary of Defense to "restrict the application of local regulations . . . which increase price." *Id.* 318 U.S. 261, 276.

A second complete answer is that the language of the procurement regulations quoted in the Brief for the United States, pages 106-114, give no suggestion

that state milk stabilization statutes were to be superseded.[1]

The government, unable to point to any change in the language of the federal procurement statute, simply renews the thesis, denied in *Penn Dairies*, that the local law as applied to contractors "conflicts with the federal procurement policy of free bargaining in a competitive context." Brief for the United States, p. 58. Indeed the 1962 amendments to the armed services procurement act show a Congressional intent to accommodate federal procurement to state price regulation by recognizing that prices are "set by law or regulation" for some goods and services purchased by the government. Subsection (c), Act of Sept. 10, 1962, 76 Stat. 528. Appendix p. 38, infra. The Court in *Penn Dairies* found that the statutory requirement that prices be determined in open competition was the desire in Congress "to prevent favoritism, and to give

[1] The Brief for the United States cites Armed Services Procurement Regulation, par. 1-301, on pages 64, 65 and 72, and purports to quote its provisions at page 106. The quoted language does not appear to have been published in the Federal Register. 32 C.F.R. 1.301 (published December 31, 1960, in the Federal Register, 25 F.R. 14082, deals with another subject).

Compare 32 C.F.R. 1.300-1, Regulations coming under the Federal Register Act and not published therein, are invalid against any person who has not had actual knowledge of them. Section 7, Federal Register Act, 49 Stat. 500, *Hatch v. United States*, 212 F. 2d 280 (9 Cir. 1950); *Bond v. Ballie*, 141 F. 2d 278 (D.C. Cir.), cert. denied, 323 U.S. 738 (1944).

the United States the benefit of competition"[*] rather than to "displace state regulations affecting the price of articles purchased by the government." *Id.* 318 U.S. 261, 273. It is noted that the statutory exception to the requirement of competitive bidding where local price regulations render it "impracticable to secure competition" contained in the Act of March 2, 1901, 31 Stat. 905, has been re-enacted by Congress in the existing procurement statute 10 U.S.C. 2304(a)(10). *Id.*, 318 U.S. 261, 272-273.

The suggestion that the codification of the several procurement statutes in effect in 1943 show a change in congressional intent is negatived by contemporary legislative history of the procurement act. Brief for the United States, pages 67-68. For example, Section 523 of the Department of Defense Appropriation Act, 1963, 76 Stat. 318, states:

> "Provided further, That none of the funds appropriated in this Act shall be used except that, so far as practicable, all contracts shall be awarded on a formally advertized competitive bid basis to the lowest responsible bidder."

That this language was *not* intended to require procurement officers to purchase at the lowest overall cost to the government, but just the opposite, is shown by the Senate Appropriations Committee report. S. Report No. 1578, 87th Cong., 2nd Sess., p. 9. This report states that the armed services, in order to lower

[*] See the histories of profiteering in the Revolutionary and Civil Wars, in the 1898 War with Spain and in World War I. Hearings, House of Representatives, 1935, Taking the Profits Out of War, pp. 591-616.

prices, had adopted the practice of refusing tendered sealed bids, and of thereafter "calling in the contractors or vendors and engaging in negotiation for lower prices." "This contracting practice" states the report "frequently costs the lowest bidder great additional sums of money to prepare new bid information and cost data" thereby ". . . leading to a very unstable competitive situation developing in competitive bidding practices." S. Report No. 1578, 87th Cong., 2nd Sess., p. 9. The intent of Congress that procurement procedure be fair to both the government and to the contractor, even at some additional increase in cost is shown by the statement: "The [Senate] committee [on Appropriations] emphatically disapproves of the current practice of further negotiation with related bidders to low prices after all competitive bids are received and the lowest bidder has been ascertained." S. Report No. 1578, 87th Cong., 2nd Sess., p. 9.

The same Senate report shows unmistakable congressional intent that the quoted provision in the 1963 appropriation act was not intended to supersede local milk stabilization programs. Under the heading "Recognition of State Milk Stabilization Laws," the statement is made:

> "The committee strongly urges the Department of Defense to study and report to the Committees on Appropriations of House or Senate by August 15, 1962, what action it may take to abide by the State laws in the purchase of milk for installations in the several States." S. Report No. 1578, 87th Cong., 2nd Sess., p. 10.

III. The California Milk Stabilization Act Does Not Impose a Prohibition on the National Government or Its Officers.

In support of its position that independent contractors selling milk to the United States enjoy its inherent constitutional immunity from state milk stabilization regulation, the government argues that "The degree of actual interference will vary from instance to instance. However, the controlling principle [of federal immunity] leaves no room for distinctions between different governmental functions, or for judicial appraisal of the degree of obstruction." Brief for the United States, p. 84. If this be the case, then the concession by the United States that it will not "assert immunity from these [California dairy farmer milk] minimum prices but to accede to full compliance with those requirements," is conclusive in showing that the states' minimum wholesale milk price regulations are constitutionally valid. Brief for the United States, p. 12. The major portion of any increase in procurement cost to the government due to state enforcement of the milk stabilization act against independent contractors results from his passing along to the government this increase in raw product cost. In the case of the Oakland Army Terminal, the increase to the government due to minimum dairy farmer milk prices would be 5.26 cents per quart.[1] This increase sharply contrasts to the lesser

[1] The difference between the price-war return to producers of $2.75 per hundred weight of milk (6.9 cents per qt.) and the State's dairy farmer minimum price of $5.19 (11.16 cents per qt., was brought up to 12 cents per quart. R. 681.

increase of 1.87 cents per quart which would be covered by enforcement of the minimum wholesale price regulations. R. 399-403, 420. The reason is a practical one. In order to stay in business, the distributor will have to cover his costs by his selling price. These costs are largely fixed by collective bargaining agreements (wages) or by law (electricity, water, gas, transportation, taxes).

If then, as the government tacitly concedes, there is no constitutional prohibition against enforcement of the minimum dairy farmer price regulations against independent contractors selling milk to the United States, then there is no constitutional barrier to enforcing the State's minimum wholesale price regulations against such contractors. The increase of burden on the government is much greater in the case of enforcement of the minimum dairy farmer price regulations. And, as the government says, the controlling principle leaves no room "for judicial appraisal of the degree of obstruction." Brief for the United States, p. 84.

The government's brief argues that California cannot apply its even-handed milk regulation to contractors with the United States because of the latter's inherent constitutional immunity from state regulation. Brief for the United States, pp. 73-89. "The very aim [of the state's milk stabilization statute] would seem to be the same as a direct tax—to dip into the federal pocket to increase the return to California's distributors." *Ibid.*, p. 88.

Several comments are warranted here. First, the California distributors selling milk to federal post exchanges, officers' clubs, commissary grocery stores, and to troop messes are not federal instrumentalities, but are independent contractors. No claim is made, nor do the milk procurement contracts (R. 30-133, 251-279, 317-338, 357-363, 403-473) provide, that these distributors have the status of agents of the government to enter into contracts or to pledge its credit. c.f. *Alabama* v. *King & Boozer*, 314 U.S. 1, 13 (1941); *James* v. *Dravo Contracting Co.*, 302 U.S. 134, 149 (1937). Given the absence of the philosophic limitation against regulation of the sovereign, as in the case of regulation of an independent contractor, the practical desirability of allowing a state to protect its supply of a vital food should have full sway.

Secondly, 70 percent of the milk acquired by the government at the installations here in question is purchased for resale at commissary grocery stores whose prices are fixed to return to the armed services the commissary's costs of operation. R. 643, 645, 646; Section 513, Department of Defense Appropriation Act, 1963, 76 Stat. 318. Therefore, 70 percent of any increase in procurement costs will *not* come from the federal treasury, but from the patrons of the armed services' grocery stores.

The parties respectively invoke supporting lines of precedent. On the one hand, the government cites sales tax cases in which the state law was declared unconstitutional, because the tax applied directly to the

purchaser. Where the government is the purchaser, it is constitutionally immune. *Kern-Limerick, Inc.* v. *Scurlock*, 347 U.S. 110 (1954).[3] Also cited were property tax cases where the law was struck down because the United States owned the land at the time the state taxes were assessed (*Van Brocklin* v. *State of Tennessee*, 117 U.S. 151 (1886)) and regulation cases where the state law was declared unconstitutional as an attempt to regulate federal employees while performing their official duties (*Johnson* v. *Maryland*, 254 U.S. 51 (1920); *Arizona* v. *California*, 283 U.S. 423 (1931)) and or as an attempt to regulate and tax a federal instrumentality. *Mayo* v. *United States*, 319 U.S. 441 (1942). State officers rely on the precedents upholding even-handed state regulations, where enforcement is against the independent contractor (*Penn Dairies* v. *Milk Control Comm'n*, 318 U.S. 261 (1943); *Stewart & Co.* v. *Sadrakula*, 309 U.S. 94 (1940); *Baltimore & A. R. Co.* v. *Lichtenberg*, 176 Md. 383, 4 A.2d 734 (1939), appeal dismissed sub nom; *United States* v. *Baltimore & A. R. Co.*, 308 U.S. 525 (1939)), and cases sustaining non-discriminatory taxes whose legal incidence falls on the independent contractor (*Trinity Farm Co.* v. *Grosjean*, 291 U.S. 466 (1934), excise tax; *James* v. *Dravo Contracting*

[3] In *Kern-Limerick* v. *Scurlock*, 347 U.S. 110 (1954) and in *Livingston* v. *United States*, 364 U.S. 281 (1960), the court held unconstitutional state sales taxes which applied to direct purchases of articles by the United States. These cases come within such familiar precedents as *Van Brocklin* v. *Tennessee*, 117 U.S. 151 (1886) and *United States* v. *Rickert*, 188 U.S. 432 (1903), where local taxes assessed against the property of the United States were held beyond the reach of state law.

Co., 302 U.S. 134, 160 (1937), gross receipts tax; *Esso Standard Oil Co. v. Evans*, 345 U.S. 495 (1953) state privilege tax; *Smith v. Davis*, 323 U.S. 111 (1944), ad valorem tax on open account claim against the United States; *Alabama v. King & Boozer*, 314 U.S. 1, 9 (1941) sales tax; *Curry v. United States*, 314 U.S. 14 (1941), use tax; *City of Detroit v. Murray*, 355 U.S. 489 (1958), tax on possessory interest in federal personal property). Here state taxation has been upheld even though the economic cost of the regulation ultimately falls on the government. The exposure of the independent contractor to state taxation has been upheld even though the amount of the tax collected by the state is dollar for dollar passed on to the government (*Esso Standard Oil Co. v. Evans*, 345 U.S. 493; *Alabama v. King & Boozer*, 314 U.S. 1; *Curry v. United States*, 314 U.S. 14) and a state minimum price regulation has been upheld even though in practical effect the minimum price required to be received by the contractor fixed the floor on the price charged to the government. *Penn Dairies v. Milk Control Comm'n*, 318 U.S. 261.

The price regulation imposed by the California milk stabilization act, as interpreted by the highest state court, falls on the state licensed-independent contractor and does not apply to the transaction itself. *Pacific Coast Dairy v. Dept.*, 19 Cal. 2d 818, 830, 123 P. 2d 442, rev'd. on another ground, 318 U.S. 285. The determination of legal liability under a state statute is one only a state supreme court can make with

final authority. *Penn Dairies* v. *Milk Control Comm'n*, 318 U.S. 261, 270; *Alabama* v. *King & Boozer*, 314 U.S. 1, 9-10. Since the person regulated under California milk stabilization act is the state licensed independent contractor, and not the government, the instant case comes within the precedents sustaining a state's even-handed regulation of independent contractors with the United States.

The government's statement that "regulation of the prices distributors may charge is direct regulation of the terms for which the federal government may negotiate; and therefore the sovereign is constitutionally immune" is simply not true, factually or legally. Brief for the United States, p. 88. First, the legal incidence of the California law does not fall upon the government, its officers, employees, or instrumentality. This puts to one side cases like *Johnson* v. *Maryland*, 254 U.S. 51; *Arizona* v. *California*, 283 U.S. 423, and *Mayo* v. *United States*, 319 U.S. 441, where it was federal officers, or a federal instrumentality, who felt the bite of state regulation. Secondly, the class of persons regulated under the state act is not enlarged because the government contracts for the purchase of milk from an independent contractor. Only the state legislature, by amending the state statute, can shift or broaden the class of persons regulated by the milk stabilization act. The fact that the economic burden of the regulation imposed on the independent contractor is shifted to the government by reason of its contract of purchase with the contractor does not

result in an infringement of the government's immunity. *Penn Dairies* v. *Milk Control Comm'n.*, 318 U.S. 261, 269.

The same argument made here was also presented to the Court in the government's brief filed in the *Penn Dairies* case. There the government stated that: "By fixing the prices which may be charged to the United States, the effect of the [Pennsylvania] Milk Control Law is the same as if the United States itself had been directly addressed by the law." Brief for the United States, O.T. 1942, No. 399, p. 27. This thesis was specifically rejected by the Court which held:

> "But those who contract to furnish supplies or render services to the government are not such [immune federal] agencies and do not perform governmental functions. . . . and the mere fact that nondiscriminatory . . . regulation of the contractor imposes an increased economic burden on the government is no longer regarded as bringing the contractor within implied immunity of the government from state . . . regulation." *Penn Dairies* v. *Milk Control Comm'n.*, 318 U.S. 261, 269.

Since *Penn Dairies* v. *Milk Control Comm'n.*, 318 U.S. 261, cannot be distinguished, the government asks that the construction of the Constitution made there be overruled. Brief for the United States, p. 88. But in three succeeding cases the court has cited *Penn Dairies* with approval for the principle that nondis-

criminatory state regulation or taxation with persons who deal with the government is constitutionally permissible. *Railway Mail Assn.* v. *Corsi*, 326 U.S. 88, 95 (1945); *Mayo* v. *United States*, 319 U.S. 441, 447 (1943); *United States* v. *City of Detroit*, 355 U.S. 466, 474 (1937). The court in *California Comm'n* v. *United States*, 355 U.S. 534 (1958), a case involving an unconstitutional burden on the federal transportation procurement function, took pains to distinguish the cases upholding nondiscriminatory state taxation and regulation of persons dealing with the government, e.g., *Esso Standard Oil Co.* v. *Evans*, 345 U.S. 495; *Smith* v. *Davis*, 323 U.S. 111; *Alabama* v. *King & Boozer*, 314 U.S. 1; *James* v. *Dravo Contracting Co.*, 302 U.S. 134; *Baltimore & A. R. Co.* v. *Lichtenberg*, 176 Md. 383, 4 A.2d 734, appeal dismissed, 308 U.S. 94; *Stewart & Co.* v. *Sadrakula*, 309 U.S. 94; *Penn Dairies* v. *Milk Control Comm'n*, 318 U.S. 261; and *California Comm'n* v. *United States*, 355 U.S. 466, 543.

What the government is really asking is that the doctrine of intergovernmental immunities be partially reinstated so that a state's power to tax or regulate anyone dealing with the government is nullified whenever the federal treasury is even remotely affected. *Gillespie* v. *Oklahoma*, 257 U.S. 501 (1922), disapproved in *Oklahoma Tax Comm'n* v. *Texas Co.*, 336 U.S. 342, 365 (1949); *Panhandle Oil Co.* v. *Knox*, 277 U.S. 218 (1928); and *Graves* v. *Texas Co.*, 298 U.S. 393 (1936) disapproved in *Alabama* v. *King & Boozer*,

314 U.S. 1, 9 (1941). The California milk stabilization act affects the procurement cost of but one food item, milk, of many purchased by the government. Seventy-percent of any such increase will be borne by patrons of the commissary grocery stores, not the Treasury of the United States. Section 513, Department of Defense Appropriation Act 1963, 76 Stat. 318. R. 643, 645, 646. Concededly, California has a special interest in protecting its supply of this vital but perishable food. The argument that this slight additional procurement cost, constituting but 30 percent of any total increase, is not the normal incident of the organization within the same territory of two independent sovereigns, is not worthy of the executive department of a great nation. If federal contracting officers need more protection from state regulation of persons dealing with the government than the Congress has heretofore accorded, it does not follow they need this protection from the Court. They may obtain relief from Congress.

IV. Article I, Section 8, Clause 17, of the Constitution Is Not per se Exclusory of Local Law.

The government's argument, in effect, substitutes the phrase "exclusive jurisdiction" for the phrase in Article I, section 8, clause 17 of the Constitution which grants Congress the "power . . . to exercise exclusive legislation." Brief for the United States, p. 26. This labored construction is neither supported by the legislative history of Section 17, nor is it consist-

ent with declared public policy. The appellee makes no comment about the debates in the constitutional convention of 1787 which indicate that the consent requirement was intended to be a condition precedent to the purchase of land for the erection of forts and arsenals. *Fort Leavenworth R.R. Co.* v. *Lowe*, 114 U.S. 525,536 (1883). Instead, the government refers to the later (1788) *Federalist*, No. 43, by James Madison, first printed in the *Independent Journal*, and later as published by J. and A. McLean of New York. The *Federalist*, edited by Henry Cabot Lodge, 1888, Introduction, p. xxxvi. The court has previously stated that the individual views of Senators or Congressmen expressed in congressional debate on pending measures do not furnish a firm ground for their proper construction. *Maxwell* v. *Dow*, 176 U.S. 581, 601-602 (1900); *United States* v. *Union Pacific R.R. Co.*, 91 U.S. 72,79 (1875); *Aldridge* v. *Williams*, 3 How. 9, 24 (1824). Partisan views expressed a year later in the *Federalist* should therefore not have probative value.

On the merits, Madison's arguments merely show a need for federal supremacy, not exclusive federal jurisdiction. The statement is made that "the public money expended on such places, and the public property deposited in them, require that they should be exempt from the authority of the particular State." The *Federalist*, op. cit. p. 268. But even in the absence of exclusive jurisdiction, state authority can be exercised only where consistent with the free and effective federal use of such land. *Fort Leavenworth R.R. Co.*

v. *Lowe*, 114 U.S. 525, 539 (1895). Further, federal authority to pre-empt the application of state law to federally owned land is found in the Constitution, Article IV, Section 3, clause 2; *Utah Power & Light Co. v. United States*, 243 U.S. 389,405 (1917). Absolutely no showing is made that the plenary authority of Congress under the Supremacy Clause, the clause authorizing the regulation of federal land (Art. IV, Sec. 3, Cl. 2) and the power to exclusive legislation clause (Art. I, Cl. 8, Sec. 17), need be augmented by the per se exclusion of state law through application of the concept of exclusive jurisdiction.

The regulations of the Department of the Army state:

> "As a general rule, the Department of the Army will not seek Federal jurisdiction over Army-controlled real estate.
>
> . . . Prior to the initiation of requests for such jurisdiction, the following will be considered: (1) That in most instances, even without any measure of Federal jurisdiction, the Federal Government is legally insulated from any State or local interference with the use of Government property such as would impede the Federal mission carried out thereupon. (2) That the acquisition of exclusive Federal jurisdiction entails many disadvantages, principally the loss of State or local fire, police, and sanitation services, and the denial of rights incident to residence or domicile, otherwise establishable by inhabitants of the installation, such as

attendance at State or local schools," right to vote," and access to the authority of State or local courts, officials, or laws in matters relating to probate, domestic relations, notarizations, and inquests."[5] Army Regulation 405-20, August 14, 1961; Appendix pp. 36-37, infra.

This 1961 Army regulation follows the policy elaborated by the President's Interdepartmental Committee for the Study of Jurisdiction Over Federal Areas Within the States that: ". . . it is desirable that the Federal Government not receive, or retain, any measure whatever of legislative jurisdiction but that it hold the [federally owned] installations and areas [located outside the District of Columbia] in a proprietorial interest status only, with legislative jurisdiction remaining in the several States: . . ." Jurisdiction Over Federal Areas Within the States, Government Printing Office, 1956, Part I, p. 70.

This policy in the executive department to neither receive nor retain exclusive jurisdiction has been accompanied by a similar policy in Congress. Thus in the

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[5] *Schwartz v. O'Hara Township School Dist.*, 375 Pa. 440, 449, 100 A.2d 621 (1953); Opinion of the Justices, 42 Mete. 580 (Mass. 1841).

[6] Kansas: *State v. Corcoran*, 155 Kan. 714, 128 P.2d 909, 1004 (1942).
New Mexico: *Arledge v. Mabry*, 52 N.M. 303, 197 P.2d 884, 892 (1948).
South Dakota: *McMahon v. Polk*, 10 S.D. 296, 73 N.W. 77 (1897).
Tennessee: *State v. Willett*, 117 Tenn. 334, 97 S.W. 299 (1906).
Rhode Island: 1845 Constitution of Rhode Island, Article II, Section 5.
California: contra, *Arapaiolu v. McManamin*, 113 C.A.2d 824, 249 P.2d 318 (1952).

[7] *Lowe v. Lowe*, 150 Md. 592, 133 Atl. 729 (1926).

statutes admitting Alaska and Hawaii to statehood, Congress expressly provided that state law should become effective in military areas subject to its power of exclusive legislation until superseding federal legislation were enacted. Section 11(b), Act of July 7, 1958, 72 Stat. 347; Section 16(b), Act of March 18, 1959, 73 Stat. 11-12. See also the retrocession of jurisdiction made to Virginia, with a reservation of the power of exclusive legislation made in the Act of February 23, 1927, 44 Stat. 1176.

In order to avoid the conclusion that the congressional power of exclusive legislation is not per se preemptive of state law, a conclusion directly suggested by these executive statements of policy, the government argues that "California may no more legislate over land purchased with its consent within its borders than Maryland may legislate over the District of Columbia." Brief for the United States, p. 32. The legislative history of the District of Columbia, though, shows that Maryland made an express statutory cession of exclusive jurisdiction of the existing district to the United States. Congress by the Act of July 16, 1790, 1 Stat. 130, authorized the purchase of land for a permanent seat of government, but also provided that the operation of state laws should continue in effect over such land "until Congress shall otherwise by law provide." Thereafter in Chapter 55, 1791 Laws of Maryland, effective December 19, 1791, the State of Maryland ". . . ceded and relinquished to the congress and government of the United States, in full and absolute right, and exclusive jurisdiction" that part of

the state called Columbia. This tender of cession of exclusive jurisdiction was accepted by the Congress by the Act of February 27, 1801, 2 Stat. 103, the acceptance providing "that the laws of the state of Maryland, as they now exist, shall be and continue in force in that part of the said district [of Columbia], which was ceded by that state to the United States . . . ." See *Morris v. United States*, 174 U.S. 196, 198-200 (1899). Thereafter the Congress enacted its own municipal law for the district by the creation of a police force (Act of August 6, 1861, 12 Stat. 320), and by establishing a territorial government, Act of February 21, 1871, 16 Stat. 419. This legislative history shows that exclusive federal jurisdiction over the District of Columbia was created by an express cession of that exclusive jurisdiction by the State of Maryland, and its express acceptance by the Congress. In sharp contrast, there has been no express cession of jurisdiction over the Travis, Castle, and Oakland bases by the State of California. Therefore, the jurisdictional status of these bases and of the District of Columbia are not comparable.

Two observations may be made about the expressions of opinion in *Fort Leavenworth R.R. Co. v. Lowe*, 114 U.S. 525, and *Surplus Trading Co. v. Cook*, 281 U.S. 647, cited by appellee for the proposition that Article I, Section 8, clause 17, is *per se* preemptive of state law. Brief for the United States, pp. 26-29. First, the state statutes construed in these cases were respectively a cession statute (1875 Laws of

Kansas, p. 95), and a statute which both ceded state jurisdiction and granted the state's consent to purchase. Arkansas Acts of 1903, p. 346. Secondly, the opinions in both cases assumed that a state could not constitutionally make a reservation of state authority in a statute transferring state jurisdiction to the United States because the power of Congress under clause 17 could be exercised exclusively. These statements in *Fort Leavenworth* and *Surplus Trading* were deemed *obiter dictum* and disapproved in *James v. Dravo Contracting Co.*, 302 U.S. 134, 146-147. Therefore, the reiteration in the brief for the United States of these discredited statements from the *Fort Leavenworth* and *Surplus Trading* cases does not advance the thesis put forward by the government.

The government, on page 45 of its brief, characterized *Pacific Coast Dairy* v. *Dept.*, 318 U.S. 285, as holding that the United States had acquired jurisdiction over Moffett Field by purchasing the land there with the consent of the State. To the contrary, the State in *Pacific Coast Dairy*, by filing a demurrer in the Supreme Court of California, admitted provisionally, for testing the question of law involved, the allegation in the complaint that the United States exercised jurisdiction over Moffett Field. Brief for Appellees, O.T., 1942, No. 275, p. 3. The Court apparently assumed from this concession that the United States had filed land descriptions of Moffett Field under the State's 1897 cession statute since chief reliance was made in the opinion on *Standard Oil Co. v. California*,

291 U.S. 242, and on *Consolidated Milk Producers* v. *Parker*, 19 C.2d 815, 123 P. 2d 440. *Pacific Coast Dairies* v. *Dept.*, 318 U.S. 285, 292, 293 fn. 8. In both the *Standard Oil* and *Consolidated* cases, land descriptions of the military base involved had been recorded by the government under California Statutes of 1897, Chapter 56, p. 51, and a cession thereby obtained.

This analysis both of the history of Article I, Section 8, clause 17 in the constitutional convention, and contemporary policy considerations attendant to its construction, compel the conclusion that the power in Congress to exercise exclusive legislation over federal military lands constitutes a separate but supreme power in Congress which becomes effective to displace local law only as Congress exercises this authority.

V. The Subsequent (1897) California Cession Statute Qualified the Earlier (1872) Consent Statute, and by Failing to Record Land Descriptions as Required by the 1897 Statute, the United States Did Not Acquire Jurisdiction at Castle, Travis or the Oakland Bases.

The Court need not reach the issue, much mooted by the parties, as to whether Article I, Section 8, clause 17, is *per se* preemptive of state law if it determines that the State's 1872 consent to purchase statute was qualified by the subsequent 1897 statute. This latter act, Statutes of 1897, Chapter 56, page 51, required the filing of land descriptions as a condition precedent to the transfer of jurisdiction over "all lands within this State now held, occupied, or reserved by the Government of the United States for military purposes or

defense, or which may hereafter be ceded or conveyed to said United States for such purposes; . . ."

More sweeping language cannot be imagined. "*All*" lands of the government include public domain reserved from entry, lands held, and lands occupied by the government on March 2, 1897. Also covered were all lands *ceded or conveyed* to the United States after March 2, 1897. This language covered the only two ways the government could obtain title: (1) by cession from another sovereign (e.g. Treaty of Guadalupe Hildalgo, 9 Stat. 922), and (2) by conveyance under a judgment in condemnation or a transfer of title by purchase. *Kohl* v. *United States*, 1 Otto 367, 374. The inclusion of all lands used for "military purposes or defense" clearly includes all types of military installations now located in California. In short, the 1897 statute covered the field of jurisdiction and thereby qualified the terms of the earlier 1872 statute.

The government is also in error with regard to the legislative objective of the 1897 statute. It was not intended to create an "alternative method of transferring jurisdiction." Brief for the United States, p. 49. Instead, its legislative purposes were: first, to require the filing by the United States of a public notice evincing the assumption of jurisdiction by the government, and the giving of record notice to the world of this fact, and second, to accurately describe in a recorded notice by metes and bounds, and by plat, the area taken into federal jurisdiction. By such a requirement, the state could avoid the creation of juris-

dictional "no-man's land" within the state borders. See *Valley County* v. *Thomas*, 109 Mont. 345, 97 P. 2d 345, 360 (1939). Compare *State* v. *Tully*, 31 Mont. 365, 78 Pac. 760 (1904) with *United States* v. *Tully*, 140 Fed. 899 (C.C.D. Mont. 1905).

Congress adopted this same notice requirement in amending Section 355, Revised Statutes, by the Act of October 9, 1940, 54 Stat. 1083, to provide that: "it shall be conclusively presumed" that jurisdiction has not been accepted by the United States unless exclusive or partial jurisdiction were accepted "by filing a notice of such acceptance with the Governor of such State or in such manner as may be prescribed by the laws of the State where such lands are situated." The government in its brief in *Adams* v. *United States*, O.T. 1942, No. 889, at pages 16-18, acknowledged that Congress intended by its statute to incorporate the notice and recording provisions of existing state law in order to reduce the existing jurisdiction confusion, saying: ". . . all confusion should be eliminated by requiring an unequivocal act of acceptance, such as the filing of a notification with the Governor of the State which had already been required by some state statutes[8] or by compliance with any other equivalent procedure which the states might provide, such as the recordation of maps or plats."[9]

[8] Art. 1639, 1849 Laws of Texas, land descriptions and plats to be filed with governor.

[9] Sec. 20, 1917 Stats. of Washington; Sec. 1, Ch. 110, 1895 Acts of Term.; Sec. 2, Ch. 23, 1921 Stats. of Nevada; Calif. Stats. 1897, Ch. 56, p. 51, land descriptions and plats to be filed in local offices of record.

The appellee's reply to this contention is one of confession and avoidance. Confession is made that "a State may in fact condition its grant of consent to the federal purchase of land within its borders." Brief for the United States, pp. 46-47. Avoidance of the proposition that the 1872 statute was qualified by the later 1897 statute is attempted through citation of the opinion of a previous Attorney General of California in 23 Ops. Cal. Atty. Gen. 14. This opinion concerned two tracts of land at Fort Ord, Monterey County, California. One tract of 15,809 acres had been purchased by the United States in 1917 and an adjoining tract of 13,801 acres was purchased by the government between 1940 and 1943. The opinion reached the conclusion that jurisdiction over the parcels purchased in 1917 passed to the United States by virtue of the filing of metes and bounds descriptions pursuant to the 1897 statute, because these lands were "taken for military purposes or defense *other* than the [Art. I, Sec. 8, cl. 17] constitutionally designated purposes" (emphasis added). 23 Ops. Cal. Atty. Gen. 14, 19. The amazing conclusion was also reached that some unknown degree of jurisdiction over the areas purchased between 1940 and 1943 passed to the United States even though no property descriptions had been filed as required by the 1897 statute, because these lands had been taken for "constitutionally designated [military] purposes" under the 1872 statute. 23 Ops. Cal. Atty. Gen. 14, 19. No explanation was made, or could be made, as to why the lands acquired at Fort

Ord from 1940 to 1943 was purchased for "constitutionally designated purposes," while the lands acquired for use as part of the same military reservation in 1917 were purchased "for military purposes or defense other than constitutionally designated purposes." No rational reason supports the concept that some military lands are Article I, Section 8, clause 17 lands, but that other adjacent military lands are without the scope of clause 17. Therefore, the resulting conclusion in 23 Ops. Cal. Atty. Gen. 14, that the 1897 statute does not qualify the 1872 statute, is untenable. See *James* v. *Dravo Contracting Co.*, 302 U.S. 134, 142, where the court refused to apply the rules of *ejusdem generis* in the construction of clause 17, and instead, adopted the broad construction that locks and dams came within clause 17 because "of the nature and functions of the national government which the Constitution established."

Understandably, the government cites only the holding, and not the reasoning of 23 Cal. Ops. Atty. Gen. 14. What the United States does maintain is that military lands purchased by the government under the 1872 statute are not "conveyed" to it within the meaning of the 1897 statute. Brief for the United States, pp. 46-53. But, as previously noted the term "conveyed" denotes a transfer of land pursuant to a purchase. See *Kohl* v. *United States*, 1 Otto 367, 374 (1876); *Seal of Gold Mining Co.* v. *Slater*, 161 Cal. 621, 630, 120 Pac. 15 (1911). Undoubtedly it was this construction of the phrase "conveyed" in the 1897

statute which led the Attorney General of California in opinion V.S. 3188, January 16, 1941, to express the view that the government did not obtain jurisdiction under section 34, 1872 Political Code, over a 15-acre tract of land on Government Island in the Oakland estuary purchased in 1930, and did not obtain jurisdiction under Statutes of 1897, Chapter 56, page 51, until land descriptions were recorded with the Alameda County Recorder's Office in 1940 as required by the 1897 statute.

The Judge Advocate General of the Army was also troubled by this question on which successive Attorneys General of California disagreed. In opinion J.A.G.R. 1954 2153, he reaffirmed the conclusion of an earlier opinion S.P.J.G.R. 1945 9595 that:[3]

> ". . . previous letters of acceptance addressed to the Governor accepting jurisdiction unaccompanied by the filing of maps and metes and bounds descriptions should not be relied upon as sufficient to vest jurisdiction in the United States over the lands intended to be covered thereby and that the foregoing procedure [Section 114] [[Government Code]] will accomplish the desired objective of removing all doubt in the matter."

In the resolution of this issue, the construction that the government must file metes and bounds land descriptions before obtaining jurisdiction from the state, accords with the practical necessity the public officers, federal and state, would thereby be enabled to easily

[3] The full text of J.A.G.R. 1954 2153 is set forth in the Appendix at pp. 42-45, infra. See SPJGR 1945 9595, appendix p. 45, infra.

and accurately determine the scope of the respective federal and state territorial jurisdictions.

CONCLUSION

For the reasons stated, the judgments below must be reversed.

Respectfully submitted,

STANLEY MOSK, Attorney General
of the State of California

LAWRENCE E. DONSEE
Deputy Attorney General

JOHN FOURT
Deputy Attorney General
Attorneys for Appellants

ROGER KENT
Of Counsel

APPENDIX

I. 1962 Amendments to the Armed Services Procurement Act. 76 Stat. 528.

"Title 10 of the United States Code is hereby amended as follows:

(a) Subsection 2304(a) is amended to read as follows:

"(a) Purchases of and contracts for property or services covered by this chapter shall be made by formal advertising in all cases in which the use of such method is feasible and practicable under the existing conditions and circumstances. If use of such method is not feasible and practicable, the head of an agency, subject to the requirements for determinations and findings in section 2310, may negotiate such a purchase or contract, if—".

(b) Subsection 2304(a) (14) is amended to read as follows:

"(14) the purchase or contract is for technical or special property that he determines to require a substantial initial investment or an extended period of preparation for manufacture, and for which he determines that formal advertising would be likely to result in additional cost to the Government by reason of duplication of investment or would result in duplication of necessary preparation which would unduly delay the procurement of the property;".

(c) Section 2304 is amended by adding a new subsection as follows:

"(g) In all negotiated procurements in excess of $2,500 in which rates or prices are not fixed by law or regulation and in which time of delivery will permit,

b. Chief of Engingers. The Chief of Engineers will—

(1) Evaluate each request in the light of the policy described in paragraph 3 and refer it through The Judge Advocate General to the Deputy Chief of Staff for Logistics with comments and recommendations for determination of the Army positions.

(2) In the event of a determination to annex, instruct the appropriate Division or District Engineer to communicate with the local government or agency involved and to execute the required consent to or petition for annexation. The requesting Army element will be advised concerning determination of the Army position.

(3) Maintain records pertaining to annexation of Army installations, and upon request provide information thereof.

(4) Furnish a copy of documents evidencing annexation to the Judge Advocate General; the Army commander or chief of technical service; and the installation commander.

[AG 680.2 (9 Jun 61) ENGRE]

BY ORDER OF THE SECRETARY OF THE ARMY:

G. H. DECKER,
General, United States Army,
Chief of Staff.

Official:

R. V. LEE,
Major General, United States Army,
The Adjutant General.

III. Opinion of the Judge Advocate General, JAGR 1954/2153, Department of the Army.

6802 ENGLM
STATE OF CALIFORNIA 1st Ind
(B L 9 Feb 54)

SUBJECT: Status of Federal Jurisdiction Over Military Reservations in the State of California

DA, OCofEngrs, Washington 25, DC, 19 Feb 1954

To: The Judge Advocate General,
Department of the Army
ATTN: Lands Division

1. Reference is made to 1st indorsement from your office dated 23 October 1945, file SPJGR 1945 9595.

2. The question considered in the abovementioned indorsement was whether it would be necessary or desirable to comply with the filing provisions of Section 114 of the California Government Code, approved 13 April 1943 and effective 4 August 1943, with respect to military lands acquired prior to 4 August 1943. It was recommended by your office that "previous letters of acceptance addressed to the Governor accepting jurisdiction unaccompanied by the filing of maps and metes and bounds descriptions should not be relied upon as sufficient to vest jurisdiction in the United States over the lands intended to be covered thereby and that the foregoing procedure [Section 114] will accomplish the desired objective of removing all doubt in the matter."

3. As indicated in the inclosed copy of opinion (No. 53/20) dated 8 January 1954, the Attorney General of the State of California is of the opinion that the United States obtained Federal jurisdiction over lands

within the Fort Ord Military Reservation, and presumably over other military lands within the State of California, acquired prior to 21 May 1946 (the effective date of the adoption of Section 126 of the Government Code), by virtue of the provisions of an 1872 statute which became Section 34 of the Political Code of the State of California and, as amended in 1939, ultimately became Section 111 of the Government Code. The statute, prior and subsequent to amendment, was in effect concurrently with the 1897 statute, which ultimately became Section 114 of the Government Code, until the repeal of both statutes on 19 September 1947. On the latter date, Section 126 of the Code, as amended, became the exclusive and definitive procedure for obtaining Federal jurisdiction (Cal. Const., Art. IV, Sec. 1; Cal. Statutes 1947, ch. 1532 sec. 1, 3).

4. In view of the foregoing, an opinion is requested with regard to the following:

a. Whether Sections 111 and 114 of the Government Code of the State of California provided optional and definitive procedures for obtaining Federal jurisdiction until 21 May 1946, the effective date of the adoption of Section 126.

680.2 ENGLM
STATE OF CALIFORNIA
(B. L. 9 Feb 54)

SUBJECT: Status of Federal Jurisdiction Over Military Reservations in the State of California

b. Whether the scope of Federal jurisdiction conferred under former Section 111 of the Government Code was coextensive with or less extensive than that conferred under Section 114.

c. Whether this office should continue to follow the procedure outlined in the abovequoted recommendation.

For the Chief of Engineers:

s H V Canny
Colonel, Corps of Engineers
Assistant Chief of Engineers
for Real Estate

1 Incl
n/c

JAGK 1954 2153
(9 Feb 54) 2d Ind 9 APR 1954

Subject: Jurisdiction — Military Reservations in State of California. Dept of the Army, Judge Advocate General's Office, Washington 25, D. C.

To: The Chief of Engineers, Room 7338, Bldg T-7, Gravelly Point, Va.

This office adheres to the views expressed in the opinion cited in paragraph 1 of 1st indorsement. The questions asked in paragraphs 4a and 4b therefore require no answer. In answer to the question raised in paragraph 4c, it is the opinion of this office that the mentioned procedure should be followed.

For the Judge Advocate General:

s Byrne F. Bentley
Lieutenant Colonel, JAGC
Chief, Lands Division

1 Incl
n/c

proposals shall be solicited from the maximum number of qualified sources consistent with the nature and requirements of the supplies or services to be procured; and written or oral discussions shall be conducted with all responsible offerors who submit proposals within a competitive range, price, and other factors considered: *Provided, however*, That the requirements of this subsection with respect to written or oral discussions need not be applied to procurements in implementation of authorized set-aside programs or to procurements where it can be clearly demonstrated from the existence of adequate competition or accurate prior cost experience with the product, that acceptance of an initial proposal without discussion would result in fair and reasonable prices and where the request for proposals notifies all offerors of the possibility that award may be made without discussion."

(d) The second sentence of subsection 2306(a) is amended by substituting "(f)" for "(e)".

(e) Section 2306 is amended by adding a new subsection as follows:

"(f) A prime contractor or any subcontractor shall be required to submit cost or pricing data under the circumstances listed below, and shall be required to certify that, to the best of his knowledge and belief, the cost or pricing data he submitted was accurate, complete and current—

"(1) Prior to the award of any negotiated prime contract under this title where the price is expected to exceed $100,000;

"(2) Prior to the pricing of any contract change or modification for which the price adjustment is ex-

pected to exceed $100,000, or such lesser amount as may be prescribed by the head of the agency;

"(3) Prior to the award of a subcontract at any tier where the prime contractor and each higher-tier subcontractor have been required to furnish such a certificate, if the price of such subcontract is expected to exceed $100,000; or

"(4) Prior to the pricing of any contract change or modification to a subcontract covered by (3) above, for which the price adjustment is expected to exceed $100,000 or such lesser amount as may be prescribed by the head of the agency.

"Any prime contract or change or modification thereto under which such certificate is required shall contain a provision that the price to the Government, including profit or fee, shall be adjusted to exclude any significant sums by which it may be determined by the head of the agency that such price was increased because the contractor or any subcontractor required to furnish such a certificate, furnished cost or pricing data which, as of a date agreed upon between the parties (which date shall be as close to the date of agreement on the negotiated price as is practicable), was inaccurate, incomplete or noncurrent: *Provided*, That the requirements of this subsection need not be applied to contracts or subcontracts where the price negotiated is based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the general public, *prices set by law or regulation* or, in exceptional cases where the head of the agency determines that the requirements of this subsection may be waived and states in writing his reasons for such determination." (emphasis added).

(f) The first sentence of subsection 2310(b) is amended to read as follows:

"Each determination or decision under clauses (11)–(16) of section 2304(a), section 2306(c), or section 2307(e) of this title and a decision to negotiate contracts under clauses (2), (7), (8), (10), (12), or for property or supplies under clause (11) of section 2304(a), shall be based on a written finding by the person making the determination or decision, which finding shall set out facts and circumstances that (1) are clearly illustrative of the conditions described in clauses (11)–(16) of section 2304(a), (2) clearly indicate why the type of contract selected under section 2306(c) is likely to be less costly than any other type or that it is impracticable to obtain property or services of the kind or quality required except under such a contract, (3) clearly indicate why advance payments under section 2307(e) would be in the public interest, or (4) clearly and convincingly establish with respect to the use of clauses (2), (7), (8), (10), (12), and for property or supplies under clause (11) of section 2304(a), that formal advertising would not have been feasible and practicable."

(g) Section 2311 is amended to read as follows:

"§ 2311. Delegation

"The head of an agency may delegate, subject to his direction, to any other officer or official of that agency, any power under this chapter except the power to make determinations and decisions under clauses (11)–(16) of section 2304(a) of this title. However, the power to make a determination or decision under section 2304(a)(11) of this title may be delegated to any other officer or official of that agency who is responsible for procurement, and only for con-

tracts requiring the expenditure of not more than $100,000."

(b) The amendments made by this Act shall take effect on the first day of the third calendar month which begins after the date of enactment of this Act."

Act of September 10, 1962, 76 Stat. 528.

New subsection 10 U.S.C. 2306(f), incorporating the provisions of 32 C.F.R. 7.104-29, requires that the government receive cost data on non-competitive negotiated procurement except where the price negotiated is based on ". . . prices set by law or regulation. . . ." This statutory exception shows congressional acceptance of the fairness of state regulated prices and that such local laws are compatible with federal procurement. S. Report No. 1884, 87th Cong., 2nd Sess., pp. 2-3. See *Penn Dairies* v. *Milk Control Comm'n.*, 318 U.S. 261 (1943); *Davies Warehouse Co.* v. *Bowles*, 321 U.S. 144 (1944). The legislative history of these amendments set forth in S. Report No. 1884 and H. Report No. 1638, 87th Cong., 2nd Sess., show that Congress intended thereby to emphasize that the military departments use formal advertising in procurement, unless circumstances exist which would justify procurement by negotiation. It is noted that section 2304(g), as amended, recognizes that some "rates or prices" of goods and services purchased by the government are fixed by law, and shows a Congressional intent that federal procurement be accommodated within state price fixing laws.

II. Regulation 405-20, August 14, 1961, Department of the Army

AR 405-20

TAGO 7318 A, 68047 61

ARMY REGULATIONS

No. 405-20

HEADQUARTERS,
DEPARTMENT OF THE ARMY
WASHINGTON 25, D.C., 14 August 1961

REAL ESTATE

FEDERAL JURISDICTION, AND ANNEXATION

	Paragraph
Purpose and scope	1
Policy on jurisdiction	2
Policy on annexation	3
Acquisition of jurisdiction	4
Retrocession of jurisdiction	5
Annexation	6

* These regulations supersede AR 405-20, 21 April 1955.

1. Purpose and scope. These regulations set forth the policies, basic procedures, and responsibilities concerning acceptance and retrocession of Federal jurisdiction over real estate, and the annexation by local governments and agencies of real estate, located within the several States and under the control of the Department of the Army.

2. Policy on jurisdiction. The following policies will govern decisions concerning the acceptance and retrocession of Federal jurisdiction:

a. As a general rule, the Department of the Army will not seek Federal jurisdiction over Army-controlled real estate.

b. Concurrent jurisdiction may be accepted where it is found necessary that the Federal Government furnish or augment law enforcement otherwise rendered by a State or local government. These circumstances might exist where the Army installation is of

great size, large population, or is in remote location, or because of peculiar requirements stemming from Army use, it is beyond the capacity of State or local government to render suitable service. When the acceptance of such jurisdiction is contemplated, it is desirable (if State law so permits) that—

(1) State laws and judicial and administrative authority will continue to apply with respect to taxation, marriage, divorce, attainment, adoption, commitment of mentally incompetent, descent, and distribution of property, notarizations, and inquests.

(2) The State will retain concurrent power to enforce the criminal law and to execute on the installation any civil or criminal process.

(3) Inhabitants of the installation will not thereby be deprived of any civil or political rights, especially rights to vote, and to attend State or local schools.

(4) There will be excluded from the acceptance, wherever possible and reasonable, Federal jurisdiction over public roads traversing the installation and over areas not lying within the perimeter of the main installation.

c. Exclusive jurisdiction may be accepted in those few instances where the peculiar nature of the military operation necessitates greater freedom from State and local law, or where the operation of State or local laws may unduly interfere with the mission of the installation. Prior to the initiation of requests for such jurisdiction, the following will be considered:

(1) That in most instances, even without any measure of Federal jurisdiction, the Federal Government is legally insulated from any

State or local interference with the use of Government property such as would impede the Federal mission carried out thereupon.

(2) That the acquisition of exclusive Federal jurisdiction entails many disadvantages, principally the loss of State or local fire, police, and sanitation services, and the denial of rights incident to residence or domicile, otherwise establishable by inhabitants of the installation, such as attendance at State or local schools, right to vote, and access to the authority of State or local courts, officials, or laws in matters relating to probate, domestic relations, notarization, and inquests.

d. In any event, no request for the acceptance of exclusive jurisdiction will be made unless—

(1) It is considered that the principle cited in *c*(1) above is inapplicable, impracticable of application, or that the interests of the Federal Government are not adequately protected thereunder;

(2) The possible disadvantages mentioned in *c*(2) above have been examined and weighed against the benefits expected to attach to the acceptance of exclusive jurisdiction;

(3) There is excluded from the acceptance, wherever possible and reasonable, Federal jurisdiction over public roads traversing the installation and over areas not lying within the perimeter of the main installation, and, wherever possible, reservations are made so as not to deprive inhabitants of the installation of any or all of the incidents of residence or domicile.

It is Department of the Army policy to retrocede unnecessary Federal jurisdiction to the States as expeditiously as practicable.

3. Policy on annexation. *a.* The annexation of land is governed by State law. It has no effect on Federal legislative jurisdiction, but is merely an adjustment of political boundaries within the State which does not interfere with Federal activities or functions. Some State laws permit annexation of land without consent of the owner. These regulations only concern annexation of fee-owned lands under State statutes which require the consent of or a petition from the Department of the Army as owner.

b. As a general rule, the Department of the Army will consent to or petition for annexation under circumstances indicating a resultant benefit to the land, to efficiency of land management, to its personnel, and or to the community. Possible advantages to the Army in its proprietorial status are police and fire protection; purchase of water, sewerage disposal, and other utilities at lower rates; maintenance of public roads, etc.

4. Acquisition of jurisdiction. *a. Army commanders or chiefs of technical services.* Army commanders or chiefs of technical services may initiate requests for acceptance of Federal jurisdiction over Department of the Army installations under their control. These requests will be made to the Chief of Engineers and will include the following:

(1) Reasons for requesting that jurisdiction be obtained, with appropriate indication that the policies expressed in paragraph 2 have been duly considered.

(2) Advice as to whether the installation involved is to be retained as a permanent military installation.

(3) Description of the land in sufficient detail to insure identification.

b. Chief of Engineers. The Chief of Engineers will—

(1) Evaluate each request in the light of the policy described in paragraph 2 and refer the request through The Judge Advocate General to the Deputy Chief of Staff for Logistics with comments and recommendations for determination of the Army position.

(2) Prepare jurisdiction assemblies for submission through The Judge Advocate General to the Secretary of the Army.

(3) Process all documents necessary to accomplish acquisition of jurisdiction.

(4) Maintain informational records pertaining to Federal jurisdiction over Army installations, and provide information thereof to all elements of the Army or to other Government agencies, in respect to matters for which he is responsible.

(5) Forward to The Judge Advocate General the copy of the acceptance document which bears the formal receipt of the proper State official, and furnish one additional copy to the Army commander or chief of technical service, the installation commander, and the Department of Justice.

5. Retrocession of jurisdiction. Army commanders or chiefs of technical services will initiate requests

for retrocession of Federal jurisdiction where in their opinion such action is considered to be to the Government's interest or where retention of Federal jurisdiction is considered unnecessary. Such requests will be addressed to the Chief of Engineers and will include reasons for requesting retrocession, together with a general description of the land involved in the proposed retrocession. The Chief of Engineers will evaluate such requests and refer them through The Judge Advocate General to the Deputy Chief of Staff for Logistics for determination of the Army position. Where it is decided that retrocession is in the best interests of the Government the Chief of Engineers will draft and submit through The Judge Advocate General to the Secretary of the Army such Federal and State legislation as may be necessary to accomplish retrocession. The Judge Advocate General will review such proposed legislation for form and legal sufficiency. Upon enactment of the Federal and State legislation, the Chief of Engineers will take such action as is appropriate to accomplish retrocession of jurisdiction and advise the Secretary of the Army. The Judge Advocate General, the Army commander, chief of technical service, installation commander, and the Department of Justice, of such action.

6. Annexation. *a. Army commanders or chiefs of technical services.* Army commanders or chiefs of technical services will transmit to the Chief of Engineers requests for annexation of Department of the Army installations under their control, and may themselves initiate such requests. These requests will include the information required in preceding paragraph 4 with respect to requests for acquisition of jurisdiction, with appropriate indication that the policy expressed in paragraph 3 has been considered.

IV. Opinion of the Judge Advocate General, SPJGR 1945 9595, Department of the Army.

SPJGR 1945 9595 1st Ind 23 October 1945
Hq ASF, JAGO, Washington 25, D. C.

To: Chief of Engineers, Room 1255, New War Department Building

With reference to your basic letter dated 30 August 1945 it is recommended that the transmission of the list of military reservations in the State of California therein inclosed and returned herewith be deferred at this time.

Chapter 134, Statutes of California, 1943, approved 13 April 1943 and effective 4 August 1943, establishing the California Government Code, contains the following sections:

> "111. The Legislature consents to the purchase or condemnation by the United States of any tract of land within the State for the purpose of erecting forts, magazines, arsenals, dockyards and other needful buildings, reserving authority to serve and execute process and the State's entire power of taxation as provided in this article.
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> "114. The State cedes to the United States exclusive jurisdiction over all lands within the State held, occupied, or reserved on March 2, 1897 by the United States for military purposes or defense, and over all land which thereafter has been or which may be ceded or conveyed to the United States for such purposes reserving the authority to serve and execute process, and the State's entire power of taxation. A sufficient description by metes and bounds and a map or plat of the lands shall first be filed in the proper office of

record in the county in which the lands are situated."

The provisions of section 114 of the Government Code, except for the reservation of the power of taxation, were taken from the act of 2 March 1897 (Cal. Stats. 1897, ch. 56). Prior to the enactment of section 114 this office expressed the opinion that the provisions of the act of 2 March 1897 with respect to the filing of maps and metes and bounds descriptions need not be complied with as to lands acquired subsequent to the effective date of chapter 710, California Statutes, 1939 (SPJGR 1943 3251, 27 March 1943). However, the continuance thereof, with the exception above indicated, as section 114 of the Government Code leaves little doubt as to the necessity of complying with its provisions with regard to land acquired subsequent to the effective date of 4 August 1943. The only doubt in the matter arises with reference to the meaning and scope of the words "ceded or conveyed", and this doubt should be resolved by the filing of maps and metes and bounds descriptions. As to any lands acquired prior to the effective date of section 114 of the California Government Code, this office adheres to its prior opinion of 27 March 1943, *supra*. Nevertheless it now appears that the legislature has treated and considered the act of 2 March 1897 to have been in full force and effect up to 4 August 1943 since pursuant to title 50, section 500000 of the Government Code the act of 2 March 1897 is expressly repealed. This indicates an expression that said act was effective and existent preceding its repeal. To eliminate any uncertainty concerning the status of these previously acquired lands and to discourage the possibility of needless

litigation, it is recommended that the provisions of section 114 of the Government Code should be complied with as to such prior acquisitions. In this connection, it is noted that this code section expressly applies to "all land * * * conveyed to the United States * * *."

The following procedure is recommended: The provisions of section 114 of the Government Code with respect to the filing of maps and metes and bounds descriptions should be complied with both as to lands acquired prior and subsequent to the effective date thereof. Following the filing of such maps and metes and bounds descriptions appropriate letters to the Governor accepting jurisdiction over such lands should be prepared and dispatched. Under the present state of the law it is believed that previous letters of acceptance addressed to the Governor accepting jurisdiction unaccompanied by the filing of maps and metes and bounds descriptions should not be relied upon as sufficient to vest jurisdiction in the United States over the lands intended to be covered thereby and that the foregoing procedure will accomplish the desired objective of removing all doubt in the matter.

For the Judge Advocate General:

(Signed)

Joseph H. Davis
Colonel, JAGD
Chief, Military Reservations Division

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